

Bakery Confectionery Tobacco Workers, and Grain Millers International, Local 205, AFL-CIO and Metz Baking Co., a wholly owned subsidiary of Sara Lee Bakery Group, Inc. and Teamsters Local Union No. 344, affiliated with The International Brotherhood of Teamsters, AFL-CIO.
Case 30-CD-167-1

August 21, 2003

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, SCHAMBER, AND ACOSTA

The charge in this Section 10(k) proceeding was filed on October 16, 2002, by Metz Baking Company (the Employer), alleging that the Respondent, Bakery Workers Union, Local 205 (Local 205), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to continue assigning certain work to employees it represents rather than to employees represented by Teamsters Local 344 (Local 344). The hearing was held on November 13, 2002, before Hearing Officer Anita C. O'Neil.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, an Iowa corporation, is engaged in the business of manufacturing and distributing bread and buns at its Milwaukee, Wisconsin facility, where during the past calendar year, a representative period, it purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Wisconsin. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 205 and Local 344 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Local 205 has represented production, maintenance, and sanitation department employees (the production unit) and Local 344 has represented shipping employees (the shipping unit) at the Employer's facility for decades. As a general matter, production unit employees perform all aspects of the baking and packaging process. Shipping unit employees load finished baked products onto outbound trucks and unload trucks bringing in finished

products from other bakeries as well as baskets and dollies being returned to the Employer.

The events that gave rise to the charge in this proceeding began in April 2002 when employee Jose Flores retired from the "stocker" position at the Employer's facility.¹ The stocker position appears in collective-bargaining agreements between the Employer's predecessors and Local 205 dating at least to 1962. For a number of years there was one stocker position at the facility. In October 2000, the Employer created a second stocker position in order to keep up with changing product lines.

The stocker's duties consist of receiving and storing raw materials such as flour, sugar, oil, and honey that are used in the baked goods that the Employer produces. Specifically, when raw goods arrive by truck, the stocker meets the truck in the shipping area, checks the truck seals, inspects the raw materials and packaging for freshness and damage, unloads the raw materials, and puts them in the appropriate storage areas. The stocker also keeps different baking areas stocked with ingredients, tracks the inventory of raw materials, rotates the materials, and orders raw materials. The stocker reports to the supervisor of the sanitation department, who is responsible for ensuring that the Employer complies with all government regulations relating to the cleanliness of ingredients and products. The sanitation department is a production unit department.

J. P. Miller was the stocker for several years before retiring in February 1987, at which time Jose Flores successfully bid on the stocker position. George Salandich was the stocker prior to Miller. Salandich, Miller, and Flores were production unit employees.

Before becoming the stocker, Flores was classified as the utility/elevator operator, a production unit position, and his job entailed bringing finished products down to the shipping area for shipping unit employees to load onto trucks. Throughout 1986, however, Flores also helped shipping employees load and unload trucks because he had a lot of downtime, and he performed Miller's stocker duties when raw materials were received on Miller's day off.

In October 1986, Local 344 filed a grievance concerning Flores' performance of shipping unit work.² On

¹ The stocker position is sometimes referred to by the Employer and Local 344 as the receiving clerk.

² The grievance stated:

It has recently been called to my attention that worked [sic] historically performed by employees of the shipping room represented by this Local Union has been assigned to employees of [Local 205].

The assignment in question is the loading and unloading of trailers and the movement of product once it has been wrapped and trayed by production employee represented by Local 205.

January 16, 1987, the Unions and the Employer executed a jurisdictional settlement agreement. The "Jurisdictional Agreement" provided that:

This Agreement made and entered into between [predecessor employer, Local 205, and Local 344] have agreed [sic] as follows:

1. Local 344 shall have jurisdiction and employee representation of all Shipping Room employees who handle all products and merchandise from the end of the production line which shall include loading and unloading of route trucks and semi-trailers of all *finished products*.
2. Jose Flores shall remain a member of Local 205 and continue to perform work under Local 344's jurisdiction until such time [as] Jose Flores bids to other work represented by Local 205 or terminates his employment with [the employer].
3. Jose Flores shall not be eligible for wages, benefits or other conditions of employment under the Local 344 Shipping Room Agreement. . . . When under paragraph 2 above, Mr. Flores leaves his *current job*, said job shall be posted and bid made available to Shipping Room employees represented by Local 344. [Emphasis added.]³

When Miller retired in February 1987, the stocker job was posted, and Flores successfully bid on it. Flores worked as a stocker from late February or early March 1987 until his retirement in 2002. When Flores retired, the Employer posted his job for bidding among Local 205 bargaining unit employees, and filled the position with an employee represented by that Union.

Local 344 filed a grievance when it learned of Flores' retirement and the Employer's selection of a production unit employee to fill the position. Local 344's grievance asserted that when Flores retired, the stocker positions were to have become part of the shipping unit.

The Employer and Local 344 were not able to resolve the grievance, and Local 344 requested arbitration. In a letter dated April 12, Local 205 informed the Employer:

[U]ntil such time as Local 344 IBT withdraws its claim to the work historically and presently done by Local 205 bargaining unit personnel, Local 205 will take whatever economic action is necessary to protect Local 205's work jurisdiction, including, but not limited to, concerted refusals to work overtime, initiation of consumer boycott of products against the company and its vendors, and work stoppages. . . .

[Local 205] further believes that your conduct which would lead to awarding Local 205 bargaining unit work to Local 344 constitutes a material rescission [sic] of the union's contract and its recognition clause. We urge your immediate attention and response to this letter.

Having heard nothing from the Employer, Local 205's attorney sent a letter to the Employer on October 15, which advised that Local 205 considered the Employer's silence to be an unfair labor practice and a rescission of the collective-bargaining agreement, and that Local 205 would exercise its economic rights to protect its work jurisdiction.

As a result of the letter, the Employer filed the instant charge with the Board, and Local 344 agreed to postpone arbitration of its grievance while the case was pending before the Board.

B. Work in Dispute

The disputed work involves duties of the stocker position, i.e., receiving, storing, and inventorying raw materials used for baking at the Employer's Milwaukee facility.

C. Contentions of the Parties

The Employer and Local 205 contend that the work of the stocker should be awarded to employees represented by Local 205 on the basis of employer preference and past practice, relative skill, efficiency of operations, and the collective-bargaining agreement. They also assert that because the Employer is not currently hiring production employees, assigning the work to employees represented by Local 344 is likely to cause layoffs in the production unit if Daryl Hornbeck and John Blackburn, production unit employees who would be displaced, exercise their contractual bumping rights.

Local 344 contends that the work of the stocker should be awarded to employees it represents on the basis of the Jurisdictional Agreement and industry and area practice.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute under Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for work; (2) there is reasonable cause to believe that Section

I am requesting the work jurisdiction and representation of the employees assigned to doing shipping work.

³ Robert Trachsel, a Local 344 business representative since 1979, testified that Local 344 agreed to allow Flores to remain a member of Local 205 while he continued performing shipping work because the Employer said Flores would lose the pension benefits he had accrued as a member of Local 205 if he became a member of Local 344.

8(b)(4)(D) has been violated; and (3) the parties have not agreed upon a method for the voluntary adjustment of the dispute.⁴

The record establishes that production employees represented by Local 205 are currently performing the disputed stocker position work. Local 344 grieved the Employer's failure to assign the disputed work to the shipping employees it represents, and the Employer and Local 344 agreed to arbitrate the matter. Local 205 has threatened to take economic action against the Employer, including picketing and boycotts if the work is taken from the employees it represents and reassigned to the employees represented by Local 344. Hence, we find that there are competing claims for the work of the stocker and reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

Additionally, the parties stipulated, and the record establishes, that there is no agreed-on voluntary mechanism for resolving this dispute. Although the contract between the Employer and Local 344 provides for the arbitration of any disputes or misunderstandings that cannot be adjusted by conciliation, Local 205 is not bound by an arbitration procedure outside of its own collective-bargaining agreement with the Employer. *Longshoremen ILWU Local 6 (Golden Grain)*, 275 NLRB 1128, 1130 (1985) (no provision in either contract for tripartite arbitration). We find that the parties do not have an agreed upon method of adjusting of the dispute, and that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

The parties agree that there are no Board orders determining the representative of the employees performing the work in dispute. The Employer and Local 205 state that Local 205 was certified by the Board to represent

production, maintenance, and sanitation employees in 1958, but they did not submit a certification into evidence. Collective-bargaining agreements between the Employer and Local 205 dating from 1962 to the present, which were submitted into evidence, however, list the "stockman" or "stocker" in their wage provisions.

Trachsel testified that Local 344's collective-bargaining relationship with the Employer dates to the 1930s. The only contract in evidence between the Employer and Local 344 is the current one, effective from September 18, 1999, through August 9, 2004. It does not refer to the stocker position or to stocker duties.⁵

On the basis of the foregoing, we find that this factor weighs in favor of awarding the work in dispute to employees represented by Local 205.

2. Company preference and past practice

Production Manager John Drott, a longtime employee, testified that the stocker position has been included in the unit represented by Local 205 for at least 44 years, that it has always been bid on from within the production unit, and that the Employer prefers to continue this practice. The record establishes that five employees, all from the production unit, have been selected for the stocker position in a period spanning more than 25 years—Salandich, Miller, Flores, Hornbeck, and Blackburn. Drott testified that production employees are best suited for the position because they are familiar with the baking process, the necessary ingredients for each product, and where ingredients should be stored until needed. He stated that because of their duties, the stockers report to the supervisor of the sanitation department (a production unit department) who is responsible for ensuring that the ingredients, baked goods, and storage areas meet health regulations.

Trachsel, author of the 1986 grievance and Jurisdictional Agreement, testified that *all* receiving and shipping was customarily the work of employees represented by Local 344, and that the work Flores performed in 1987 and thereafter had previously been shipping unit work. However, Local 344 offered no evidence that employees represented by Local 344 had previously been performing the stockers' duties.

Therefore, we find that employer preference and past practice support awarding the disputed work to employees represented by Local 205.

⁴ *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001); *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998).

⁵ The Local 344 contract does not identify unit positions or classifications. Its cover title and wage provision are the only sections that mention the Union's jurisdiction, referring to "shipping" and the "bread/bun dock."

3. Area and industry practice

Since 1983 the Employer has been the only bakery facility of its kind in the Milwaukee area. Joseph Sanchez, business agent and recording secretary for Teamsters Local 734 in Chicago, testified that he administers five or six collective-bargaining agreements in the Chicago area under which employees represented by Teamsters rather than production workers represented by Bakery Workers unload raw materials. However, only two of Local 734's collective-bargaining agreements were submitted into evidence. The 1999–2004 agreement with the Chicago Bakery Employers Labor Council currently covers two employers whose Teamster-represented employees perform all shipping and receiving including raw materials: Interstate Brands Corporation and Chicago Baking Company. The 2001–2005 agreement with Entenmann's Inc. appears to apply to employees at a distribution center rather than an onsite bakery. Sanchez further testified that, as far as he is aware, the baking facilities at which employees represented by Bakery Workers unload raw materials are those where “some side verbal agreement [was made] 40 years ago,” and he said that the Teamsters are trying to get those jobs back. He conceded that he was not aware that collective-bargaining agreements between Bakery Workers and Milwaukee area bakery employers historically included stockers, surmising, “I guess they do things a little differently up here than they do in Chicago.”

Larry Wedan, business agent for Teamsters Local 695 in Madison, Wisconsin, testified concerning two other collective-bargaining agreements that were entered into evidence. However, *all* of the employees at the two bakeries covered by those agreements—including the employees who perform baking—are represented by Teamsters Local 695.

The Employer and Local 205 did not present evidence concerning area and industry practice. There is no evidence concerning the practice of other employers in the Milwaukee area. The testimony of the business agents from Teamsters Local 695 and Local 734 indicates that the Teamsters represents both production and shipping employees in Madison and that historically and regionally the assignment of the disputed work seems to vary. Based on the foregoing, we find that this factor does not favor an award to employees represented by either Union.

4. Relative skills

No party contends that the physical task of unloading raw materials from incoming trucks requires expertise, and the training for the job, including computer work, has been on-the-job training. However, as indicated

above, several witnesses testified on behalf of the Employer and Local 205 that production unit employees bring practical knowledge to the storage, supply, and inventory aspects of the stocker job owing to their baking experience.

We find that this factor weighs in favor of awarding the work to employees represented Local 205.

5. Economy and efficiency of operations

The parties introduced evidence about hourly wages, a consideration that the Board does not deem relevant to making an award. *Painters Local 91 (Frank M. Burson, Inc.)*, 265 NLRB 1685, 1687 (1982). In connection with what they termed “other factors,” the Employer and Local 205 elicited testimony that the Employer is not currently hiring production unit employees, and that assigning the disputed work to employees represented by Local 344 likely would result in the layoff of two production unit employees if the current stockers, Hornbeck and Blackburn, exercised their contractual bumping rights. Although Local 344 counters that layoffs need not be the necessary result, we find that the avoidance of potential layoffs and unnecessary disruption in the production unit is a valid consideration that favors awarding the work to employees represented by Local 205. See *Machine Printers (Cranston Print)*, 269 NLRB 223, 225 (1984), and *Auto Workers Local 244 (Massey-Ferguson)*, 268 NLRB 933, 935 (1984).

6. Joint Board determinations

No party asserts that there are any Joint Board determinations designating which employees should perform the work in dispute.

Other considerations

Local 344 urges the Board to consider the 1987 Jurisdictional Agreement arrived at among the parties in settlement of the grievance it submitted over Flores' performance of shipping duties in 1986. It asserts that the document reflects the parties' agreement to transfer all shipping and receiving work to its jurisdiction when Flores left his job. We disagree.

The grievance and the Jurisdictional Agreement specifically referred to loading and unloading finished products. Neither document made reference to the stocker or receiving clerk position, or to receiving raw materials.⁶ On its face, the Jurisdictional Agreement permitted Flores to continue performing work within the jurisdiction

⁶ Neither Local 205 Business Representative James Miller, who received the grievance in 1986 and investigated it, nor Trachsel recalled the mention of specific classifications during discussions about the 1986 grievance.

of Local 344 without changing his union affiliation until he left his then current job.

At the time the grievance arose and the Joint Agreement was executed, Flores was classified as the utility/elevator operator, a production unit position, but he was performing a hodge-podge of duties including occasional stocker duties (production unit work) and loading and unloading finished products (shipping unit work). Within 2 months of execution of the Jurisdictional Agreement, Flores “bid to other work” and became the stocker, and he ceased loading and unloading finished products. Thus, it appears from the plain language of the Jurisdictional Agreement that the terms of the settlement were complied with as of late February or early March 1987 when Flores ceased doing work within Local 344’s jurisdiction.⁷

In these circumstances, we find that the Jurisdictional Agreement does not support Local 344’s contention that the employees it represents are entitled to perform the stocker’s duties.⁸

⁷ Trachsel testified that although he was not aware of the stocker classification, he intended that the Jurisdictional Agreement transfer the stocker’s duties to the jurisdiction of Local 344. However, the Board will not use parol evidence about intent to vary the plain language of a contractual provision. *U.S. Utilities Corp.*, 254 NLRB 480 (1981) (8(a)(5) abrogation of contract); *Ironworkers Local 272 (SAC Construction Co.)*, 241 NLRB 438 (1979) (jurisdictional clause); *Horn Mfg. Co.*, 83 NLRB 1177 (1949) (union-security clause).

⁸ The Jurisdictional Agreement is not incorporated by reference in the 1999-2004 collective-bargaining agreement between Local 344 and the Employer, and there is no evidence that it was made a part of earlier

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 205 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement, employer preference and past practice, relative skill, and efficiency and economy. In making this determination, we are awarding the work to employees represented by Local 205, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Metz Baking Company, represented by Bakery Confectionary Tobacco Workers, and Grain Millers International, Local 205, AFL-CIO are entitled to perform the work of the stocker/receiving clerk position at the Employer’s Milwaukee, Wisconsin facility.

contracts. Further, although no party argues the point, art. 19, the complete agreement provision of the 1999–2004 collective-bargaining agreement, states:

In this Agreement, the Employer and the Union embody the entire results of their negotiations which have covered all aspects of rates of pay, wages, hours of employment, and all such subjects are settled. *This Agreement supersedes and voids all prior agreements, written or oral, or established by custom, practice, or precedent.* Future understandings or interpretations of the Agreement shall not be binding unless they are reduced to writing. [Emphasis added.]